

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DEFENSE DISTRIBUTED, et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF STATE, et al.,

Defendants.

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Case No. 15-CV-372-RP

**MOTION TO STRIKE PART B OF SUPPLEMENTAL MOTION FOR LEAVE TO
INTERVENE AND SPECIFIC PARAGRAPHS OF DECLARATIONS OF NICHOLAS
SUPLINA, ALISON DAMASKOS, AND JOSHUA SCHARFF**

Plaintiffs incorporate by reference the arguments made in our Memorandum of Points and authorities in opposition to Joint Emergency Motion To Intervene concerning the failure of the Proposed Intervenor (“the Groups”) to timely intervene. At approximately 9:00 a.m. this morning—five hours before the hearing was scheduled to commence, and while counsel for Plaintiffs were en route to Austin—the Groups filed a “Supplemental Briefing in Support of Motion for Leave to Intervene.” ECF No. 103. This Brief does not merely supplement arguments made in their prior 11th-hour motion for leave to intervene. Rather, it raises an entirely new argument that is designed to remedy a fatal flaw in their initial motion: that the “Proposed Intervenor have *expended* significant efforts counteracting the parties’ conduct.” Br. at 3. That is, they have *already* expended resources. This statement is in conflict with their prior claim that “[a]s a result of the Settlement Agreement, Proposed Intervenor *will* be forced to expend additional resources to protect their respective missions.” Motion for Leave to Intervene at 7 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)) (emphasis added). That is, they *will* expend resources. Their initial brief made no reference to resources *already expended*.

During the hearing, this Court asked the Plaintiffs to respond to the briefs by “mid-morning.” We toiled throughout the night to respond to the legal theory presented by Plaintiffs. It is fundamentally unfair to force us to now respond to a completely different legal theory hours before the hearing. The failure of the Groups to raise this argument in their initial pleading must constitute waiver. We respectfully ask the Court to strike Part B of the Supplemental Motion for Leave to Intervene.

In addition, we ask this Court to strike the following paragraphs from the Declarations, which discuss alleged resources that have already been expended:

- Suplina Dec. ¶¶ 7-8.
- Scharff Dec. ¶ 5-7.
- Damaskos Dec. ¶¶ 4-9

There is no reason why these arguments could not have been raised earlier. Moreover, there is no reason why these Declarations could not have been shared with the parties earlier. *Nothing* in these Declarations reflect circumstances that arose in the past 24 hours. They all discuss events that transpired well before to July 25, 2018.

The Plaintiffs should not be forced to shadowbox against a moving target on the eve of the settlement, when constitutional rights are at stake.

Dated: July 27, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a) on July 27, 2018, and was served via CM/ECF on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(b)(1).

By: /s/ Alan Gura

Alan Gura